SUPREME COURT, U. S.
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In The

Supreme Court of the United States

No. 73-1927

In the Matter of

MARCEL FREUDMANN,

Petitioner,

vs.

JOSEPH BLANKSTEIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Joseph Blankstein, Trustee in Bankruptcy and Respondent, respectfully prays that the instant petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review a judgment entered on March 28, 1974 be denied.

OPINIONS BELOW

Except as noted in the petition, the opinions below have not yet been reported.

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Second Circuit properly affirm, unanimously and in open court, the determination of the District Judge sustaining the factual findings of the Referee in Bankruptcy that petitioner had, within twelve months prior to the filing of the petition in bankruptcy, transferred property with intent to hinder, delay or defraud creditors?

2. Was the determination of the District Judge so clearly erroneous as to require reversal by the Circuit Court where the proof showed that petitioner persistently purchased diamonds on credit and sold them for cash below his own purchase price, and utilized some of the proceeds for personal use?

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Contrary to the petition's claim, petitioner's discharge in bankruptcy has been twice denied by the Referee, and this determination sustained by the District Judge and Circuit Court, on grounds clearly set forth in the Bankruptcy Act. Indeed, at page 3 of the petition, the very statutory provision involved is quoted by petitioner. Nevertheless, by quoting the District Court out of context, petitioner seeks to persuade this Court that there is no basis for denial of discharge grounded in the statute. It is clear from the full text of the opinions below that the dearth of authority referred to in the quoted language was with respect to the particular conduct engaged in by petitioner. As will be demonstrated below, this case turns not on a determination of

any significant legal question or determination, but a simple determination whether petitioner engaged in knowing and willful conduct inviolation of the statute.

Petitioner is a diamond merchant who encountered financial difficulty. As a result, he began a course of conduct in which he purchased diamonds from vendors on credit and sold them below cost for cash. This is conceded in the petition (P4)[1] and in his testimony at the first hearing before Referee Herzog (A136).[2] In his testimony, Mr. Freudmann admitted that in all of the transactions the purchase from the vendor and the resale by him were contemporaneous, usually the same day, and that, when he purchased a particular diamond, he knew that he would immediately sell it at a lower price already stated by the buyer.

Thus, at the original examination, petitioner testified:

> "Q. Now, the accountant reports further that you sold this merchandise in this last year at a loss of $303,948.00. Did you in fact sell your merchandise at a loss? A. I did" (A72).

and

> "Q. So you bought on time and you sold for cash, and when I use the word cash, I mean check or whatever? A. Yes.

1. References labeled "P" are to the indicated page of the petition in this Court.

2. References labeled "A" are to the Appendix before the Second Circuit Court of Appeals.

> Q. What you were doing was trading somebody's credit in order to get money to pay off some debts you had, is that right? A. Yes, sir" (A77-78).

A detailed analysis of the transactions entered into by petitioner for the period of time before he ceased operations was prepared by the Trustee and placed into evidence at the hearings before the Referee (A345-359). Included in those analyses were invoices and other documents which indicated purchase of diamonds from a vendor and contemporaneous resale of the same diamonds. The Referee determined that "[t]he Trustee was able to match purchases and sales invoices which showed that from May 1, 1969 to April, 1970, the bankrupt bought diamonds on credit for $521,546, which he sold for $414,231, thereby suffering a loss of $107,315" (P18). As Referee Herzog noted:

> "Instead of kiting checks, the bankrupt was in effect kiting diamonds, using the proceeds of his below cost sales to meet various notes as they fell due (SM117). As in all kiting schemes, there came a point when the pressure built up and he could no longer meet the note payments (SM12, 122)" (P22).

The record is replete with specific transactions in which petitioner bought diamonds from established sources on "time" and simultaneously or approximately so resold the same diamonds at a substantially lower cash price. The record is further replete with testimony from petitioner that this course of conduct was intentional and willful, and there is nowhere a

denial of the fact that the losses were voluntarily and knowingly sustained.

In many of those instances, the diamonds were acquired by petitioner on "memo", which meant that the goods could be returned without liability in the event the diamonds could not be sold profitably. Nevertheless, with knowledge of that fact, petitioner concluded numerous cash sales at a lower price than that of the purchase, and then issued notes to his suppliers for the previously determined larger amount. For example,

(a) On January 22, 1970, the bankrupt bought a diamond for $29,460 and resold it on the same date for $20,000, at a loss of $9,460 (A78-80).

(b) On March 20, 1970, the bankrupt sold a diamond for $8,000 which cost him $13,068 in a transaction concluded on April 1, 1970. The bankrupt took a loss of $5,068 in a transaction he was not legally obligated to conclude (A80-83).

(c) On April 17, 1970, the bankrupt sold a diamond for $13,500, which in a purchase concluded three days later cost him $17,130 (A85-86).

Although petitioner seems to imply in his petition that there were only fifteen such transactions, the fact of the matter is that the Trustee demonstrated at the hearings nearly fifty. Referee Herzog listed fifteen of those as "glaring illustrations" (P19) of petitioner's course of conduct, finding it unnecessary to give further examples of what he twice determined to be a pattern of intentional behavior. Although petitioner attempted

(unsuccessfully) at the rehearing to explain away those fifteen specific illustrations, he made no attempt to explain the nearly thirty-five others matched by the Trustee. Not only did petitioner's testimony at the rehearing fail to provide adequate explanation, it reinforced the conclusion that the diamonds had been resold at the lower price even before petitioner had concluded his purchase.

In the face of the overwhelming evidence that he had persistently sold diamonds below his own purchase price, pyramiding his debts to creditors yet higher and higher, petitioner offered no proof whatever of adequate consideration. Neither did he offer any proof to contravene the claim that he engaged in that course of conduct with intent to hinder, delay or defraud his creditors, a claim that was reinforced by his own testimony that he was engaged in a futile attempt to forestall the inevitable day of reckoning.

The proof, including petitioner's own testimony, was that both he and his vendors were aware that he was selling diamonds below cost. Being experienced in the field, they must be presumed to know that a merchant engaging in such a course of conduct was in financial difficulty, and was attempting, in Referee Herzog's words, to avoid "a morass of indebtedness" (P33). A conscious pattern was developed, involving much more than isolated transactions which resulted in losses. Simple common sense would indicate to even the average businessman that such a course of conduct could only result in more and more debt, until the inevitable total financial collapse. Yet petitioner, a man of "shrewd and of better than average intelligence" (P32), persisted in his behavior in disregard of the

obligations he was incurring by increasing the number and amounts of notes to become due, and in disregard of the rights of those creditors to whom the payments would have to be made.

Although petitioner attempted to explain this lengthy course of futile conduct as a bizarre attempt to keep his head above turbulent financial waters, he conceded that, during the period of time in which he so acted, he withdrew $66,000 from the business for his own personal use in the last thirteen months of operations (A325-26, A329-34). As the Referee noted in his second decision, "[c]onsidering that he was insolvent and that he was using his creditors' money, this large withdrawal for personal use fits into the pattern of the reckless and dangerous course . . . "(P33).

It was fully demonstrated in the various decisions below that petitioner engaged in a prohibited course of conduct and that petitioner wholly failed to rebut any inferences or indications that his conduct was in violation of the statutory proscription. Contrary to the statements in the petition, the District Judge did not find that the funds thus obtained were used to pay creditors, and instead confirmed the Referee's findings that they had been applied for personal use.

REASONS FOR DENIAL OF THE PETITION

(a) The Court of Appeals' determination sought to be reviewed is not in conflict with the decision of another Court of Appeals.

(b) No important issue of federal law is presented, the case having turned on the issue of sufficiency of proof, which issue is not of sufficient importance to warrant review by this Court. The denial of discharge is clearly in accord with the principles enumerated in the several decisions below and not in conflict with any reported decision.

The Trustee established conclusively that the bankrupt engaged in a clear pattern of purposeful conduct which constituted actual intent to defraud. The statutory standard is clear that once reasonable ground to believe that fraud was committed is established, the burden of proving the absence of fraud shifts to the bankrupt. Nowhere does the bankrupt even claim to have met this burden, and for that reason the discharge was denied.

The issues thus involved do not rise to the level of "national importance" as claimed by petitioner and it is respectfully submitted that review by this Court is not warranted in this case.

CONCLUSION

For the reasons stated, it is prayed that the petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review its unanimous affirmance of the order of the United States District Court for the Southern District of New York, which order sustained the determination of the Referee in Bankruptcy denying a discharge in bankruptcy, be denied.

Respectfully submitted,

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